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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SHARON CANNON, Plaintiff and Appellant, v. JOHN S. BETTINGER et al., Defendants and Respondents.	B205710 (Los Angeles County Super. Ct. No. BC365079)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Diamond, Burt & Akhkashian, Khachik Akhkashian and Lisa Stratman for Plaintiff and Appellant.

Watkins, Casaudoumecq & Letofsky, Daniel R. Watkins and Caroline K. Tseng, for Defendants and Respondents.

* * * * * *

Sharon Cannon appeals from a judgment of dismissal following the sustaining of a general demurrer without leave to amend her first amended complaint, which alleged claims for conversion and fraud against respondents John S. Bettinger, DDS; John S. Bettinger DDS, a professional corporation; Gary R. Harmatz, DDS; David M. Hillings; The Dentists Insurance Company, Inc. (TDIC); California Dental Association (CDA); and Los Angeles Dental Society (LADS). Because we agree with the trial court that the claims are time-barred and each fails to state a cause of action, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Although the statement of facts set forth in appellant's brief is inexplicably taken from her proposed second amended complaint (SAC), we recite the factual allegations from the first amended complaint (FAC), which was the subject of the demurrer. We note that on appeal from a judgment of dismissal following a demurrer sustained without leave to amend, we assume the truth of all well-pleaded facts, as well as those that are judicially noticeable, but not contentions, deductions or conclusions of fact or law. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

On July 7, 1998, appellant filed a dental complaint against Dr. Bettinger and his dental corporation with CDA. Appellant's complaint was later transferred to LADS. On July 16, 1998, appellant began dental treatment with Earl Smith, DDS, who made dental study models of appellant that day. On or about September 30, 1998, Dr. Smith sent his original study models to CDA and LADS, and he has not had possession of them since that time. On June 11, 1999, LADS issued a written resolution, approved by CDA, finding that Dr. Bettinger's treatment of appellant fell below the standard of care for a dentist practicing in California and that he was to refund the amount paid for appellant's care.

On June 23, 1999, appellant, in propria persona, filed a dental malpractice action against Dr. Bettinger in state court. On June 30, 1999, CDA and LADS closed their case in light of appellant's court action and retained possession of the original study models,

which had a diagnostic value of at least $15,275. Appellant designated Dr. Smith as her expert witness in October 2001. Dr. Bettinger's legal counsel was David M. Hillings and his expert witness was Gary R. Harmatz. A four-day jury trial was conducted between December 16 and 19, 2003, and a judgment was entered in favor of Dr. Bettinger.

During the trial on December 18, 2003, after Dr. Smith had testified and returned to Arizona, Dr. Bettinger, Hillings and TDIC produced their new "last-minute evidence" consisting of Dr. Smith's original study models. That same day, Dr. Bettinger falsely testified that Dr. Smith had sent the original study models to the defense. Appellant never gave her consent for any of the respondents to possess the original study models or to use them in defending the malpractice action. Appellant was denied valuable use of the study models in her dental treatment and in litigating the malpractice case.

On or about January 22, 2004, appellant contacted the peer review coordinator for CDA and LADS to inquire as to how respondents came into possession of the original study models. After reviewing the case file in storage, the coordinator falsely represented to appellant that LADS had returned the study models to Dr. Smith on or about June 30, 1999 when the matter was closed, but did not provide appellant with written verification or proof that he had received the study models, as appellant requested.

On or about February 8, 2006, appellant learned the identity of Dr. Bettinger's insurance company, TDIC, when it commenced efforts to collect as a beneficiary of the judgment rendered against appellant. The FAC alleges that appellant could not with due diligence have discovered the conversion of Dr. Smith's original study models until she learned the identity of Dr. Bettinger's insurer and its close relationship with the other respondents.

Appellant filed the instant action on January 22, 2007. She filed the FAC on August 10, 2007, alleging causes of action for conversion, trespass to chattel, fraud, negligent misrepresentation and conspiracy against all respondents, and alleging negligence against CDA and LADS. In response to the FAC, respondents filed a demurrer, a motion to strike portions of the pleading and a special motion to strike. The

same day, appellant filed a motion for leave to file an amended complaint, attaching her proposed SAC.

The trial court sustained the demurrer without leave to amend. At the hearing on the demurrer, the court stated: "I just don't think that there is really a case here. I know [appellant] originally filed this *pro. per.*, and I'm sure she feels very wronged by what happened at that other trial, but I don't think there's a case here. I think that the statute of limitations did start to run when these things were produced, that she knew everyone who was involved except potentially the insurance company. But that's not a basis to stay the action. I don't think there was a duty on behalf of any of the parties to return this. There was no indication there was a demand to return this, and I just don't see that any of these causes of action are viable." The trial court ordered respondents' motions to strike and appellant's motion for leave to file the SAC off calendar as moot. A judgment of dismissal was entered, and this appeal followed.

DISCUSSION

I. Standard of Review.

Appellant misstates our standard of review in her opening brief, mistakenly providing the standard of review and her burden on a motion for summary judgment. We note that we review de novo a trial court's sustaining of a demurrer, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300*; Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) We assume the truth of properly pleaded allegations in the complaint and give the complaint a reasonable interpretation, reading it as a whole and with all its parts in their context. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558; *People ex rel. Lungren*, *supra*, at p. 300.) A complaint which shows on its face that the cause of action is barred by the statute of limitations is subject to demurrer. (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 440, fn. 5.)

We apply the abuse of discretion standard in reviewing a trial court's denial of leave to amend. (*Blank v. Kirwan, supra,* 39 Cal.3d at p. 318; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497–1498.) The plaintiff bears the burden of proving the trial court abused its discretion in denying leave to amend. (*Blank v. Kirwan, supra,* at p. 318; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020.)

II. The Demurrer was Properly Sustained.

A. Accrual of Actions

Civil actions can only be commenced within the prescribed period of limitation after the cause of action has accrued. (Code Civ. Proc., § 312; *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487.) Generally, a cause of action accrues when the wrongful act is done and liability arises, i.e., when the last fact essential to the cause of action occurs. (*Angeles Chemical Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 120.) This is so even if the plaintiff is unaware of the cause of action. (*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35.) Under certain circumstances, the "delayed discovery rule" delays the accrual date of a cause of action until the plaintiff is aware of his or her injury and its cause. "The plaintiff is charged with this awareness as of the date he or she suspects or should suspect that the injury was caused by someone's wrongful act. The period of limitations, therefore, will begin to run when the plaintiff has a 'suspicion of wrongdoing'; in other words, when he or she has notice of information of circumstances to put a reasonable person on inquiry." (*Ibid*.) "A plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.) Delayed discovery has been adopted to protect plaintiffs who are ignorant of their right of action through no fault of their own. (*Hogar Dulce Hogar v. Community Development Commission* (2003) 110 Cal.App.4th 1288, 1297.) The rule is based on the notion that statutes of limitations are intended to run against those who fail to exercise reasonable care in the protection and enforcement of their rights. (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1536.)

B. Conversion and Trespass to Chattel

Appellant's first two causes of action are for conversion and trespass to chattel. The elements of a cause of action for conversion are (1) the plaintiff's ownership or right to possession of the property, (2) the defendant's conversion by a wrongful act or disposition of property rights, and (3) damages. (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.) The elements of a cause of action for trespass to chattel are (1) the plaintiff's possession of the property, (2) the defendant's intentional interference with the plaintiff's use of the property, (3) without the plaintiff's consent, and (4) damages. (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566–1567.) Both of these causes of action are subject to a three-year statute of limitations (Code Civ. Proc., § 338, subd. (c) [applicable to "action[s] for taking, detaining, or injuring any goods or chattels"].) Appellant filed her original complaint on January 22, 2007. As such, her first two causes of action are untimely if she discovered the wrongful acts prior to January 22, 2004.

"Under California law, the general rule is well established: '[T]he statute of limitations for conversion is triggered by the act of wrongfully taking property.'" (*AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 639.) To the extent courts have recognized a discovery rule exception to toll the statute, "it has only been when the defendant in a conversion action fraudulently conceals the relevant facts or where the defendant fails to disclose such facts in violation of his or her fiduciary duty to the plaintiff. In those instances, 'the statute of limitations does not commence to run until the aggrieved party discovers or ought to have discovered the existence of the cause of action for conversion.'" (*Ibid.*)

The FAC alleges that "on or about June 30, 1999," when respondents CDA and LADS closed their case because appellant had commenced litigation, "they retained possession of Dr. Smith's original 7-16-98 study models and converted same for use by Defendants Bettinger, Hillings, Harmatz and TDIC in defending the underlying action without Plaintiff's knowledge or requisite authorization," and "interfered with its [*sic*] use by delivering said study models to Bettinger, Hillings, Harmatz and TDIC so that

they may defend the underlying action against Plaintiff." Thus, on the face of the FAC, these two causes of action accrued on June 30, 1999, almost eight years before the instant action was filed.

In an attempt to take advantage of the limited discovery rule exception, appellant makes the conclusory allegation in the FAC that respondents "concealed their possession and use of Dr. Smith's 7-16-98 study models in defending the underlying action from Plaintiff and Dr. Smith for years, from June 30, 1999, until on or about December 18, 2003," at which time Dr. Bettinger, Hillings and TDIC produced the models at trial. The FAC does not set forth facts showing how respondents concealed their possession and use of the original models. But even if we were to assume the truth of this allegation, the FAC was not filed within three years of December 18, 2003.

Moreover, the allegation in the FAC that appellant could not have discovered the conversion until on or about February 8, 2006 when she learned the identity of Dr. Bettinger's insurance company does not save these claims. As of December 18, 2003, at the latest, appellant knew, or should have known, the crucial fact that at least some of the respondents had possession and use of the models without her consent. She then had three years in which to investigate and file her lawsuit. There is no requirement that a plaintiff learn the identity of every defendant before the statute of limitations is triggered. Indeed, the opposite is true. It is the general rule that a statute of limitations will begin to run despite the plaintiff's ignorance of the identity of the wrongdoer. (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 494, p. 634; *Angeles Chemical Co. v. Spencer & Jones, supra,* 44 Cal.App.4th at p. 120.) Additionally, appellant's argument that it is a question for the trier of fact as to whether she was diligent in discovering the facts does not assist her. "Arguments that discovery-rule issues are necessarily factual and cannot be resolved on demurrer have been rejected." (*CAMSI IV v. Hunter Technology Corp., supra,* 230 Cal.App.3d at p. 1537.)

Appellant also argues that the instant action was timely filed on January 22, 2007, because her causes of action did not accrue until on or about January 22, 2004, when the peer review coordinator for CDA and LADS falsely represented to her that LADS had

returned the original study models to Dr. Smith on June 30, 1999. But this allegation does not save appellant's conversion and trespass to chattel claims. By the time this representation was made, appellant had already known for more than a month that respondents had possession and use of the study models without her permission. Thus, the limitations period on her causes of action had already accrued.

Finally, appellant argues for the first time on appeal that her causes of action did not accrue until on or about October 2007, when respondents' counsel allegedly informed her counsel that the subject models had been destroyed. But even assuming appellant could amend the FAC to state this allegation, it does not alter the fact that appellant knew, or should have known, of respondents' allegedly wrongful possession of and interference with her use of the original study models as of December 18, 2003. "The law is too well settled to require any extensive citation of authorities that one may not cure a defect in a complaint by the omission, after earlier disclosure in another pleading, of the defective allegation in a subsequent complaint pertaining to the same cause of action." (*Muller v. Muller* (1958) 156 Cal.App.2d 623, 625; *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 724.) Additionally, appellant filed the instant lawsuit well before October 2007. Certainly she filed the lawsuit believing that she had already been wronged, and she cannot therefore rely on an event after the lawsuit was filed to trigger the limitations period on her causes of action.

Appellant's proposed SAC contains the same fatal allegations as the FAC, and she does not otherwise state how she can further amend the FAC to state timely claims for conversion and trespass to chattels. Accordingly, the trial court did not err in sustaining the demurrer to these causes of action without leave to amend.

C. Fraud and Negligent Misrepresentation

The FAC alleges causes of action for "fraud and intentional deceit" and negligent misrepresentation. The elements of a cause of action for fraud and deceit are (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages. (*Service by*

Medallion, Inc. v. Clorox Co. (1996) 44 Cal.App.4th 1807, 1816.) Negligent misrepresentation is a form of deceit, the elements of which are (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce the plaintiff's reliance, (4) ignorance of the truth and justifiable reliance by the plaintiff, and (5) damages. (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962.) Such causes of action are subject to a three-year statute of limitations. (Code Civ. Proc., § 338, subd. (d).) The statute further provides that the "cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (*Ibid*.)

The FAC alleges that during the underlying trial on or about December 18, 2003, Dr. Bettinger made false representations to appellant and the court about alterations to Dr. Smith's original study models. But appellant did not file the instant action within three years of this date.

Appellant also relies on the allegation that the peer review coordinator for CDA and LADS falsely represented to her on or about January 22, 2004 that the original study models had been returned to Dr. Smith on June 30, 1999. But, as a matter of law, this allegation cannot form the basis of appellant's fraud claims for two reasons. First, appellant could not have been deceived by this representation because she already knew that Dr. Smith did not have possession of the study models. Indeed, the FAC alleges that Dr. Smith has not had possession of his original study models since September 30, 1998, and that neither she nor Dr. Smith had possession of the study models during the underlying malpractice case. Second, there can be no justifiable reliance on this representation. The FAC alleges that appellant relied on the false representations in not having expert assistance from Dr. Smith at the underlying malpractice trial. But this representation was made after the trial had concluded, and therefore could have no bearing on actions taken by appellant beforehand. The proposed SAC goes back in time even further, alleging that had appellant known the truth of respondents' concealments, she would not have filed the initial peer review complaint with CDA and LADS in 1998.

But, again, this representation was made almost six years after the initial peer review complaint was filed.

Nor are appellant's fraud claims otherwise timely stated in her proposed SAC. The SAC alleges that respondents "concealed their possession and use of Dr. Smith's original 7-16-98 study models from Plaintiff and Dr. Smith for years, from on or about June 30, 1999, until on or about December 18, 2003, when Plaintiff visually observed them in the possession of Defendants Bettinger and Hillings" and that "[o]n or about December 24, 2003, Defendant Hillings [who was appellant's opposing counsel] falsely represented to Plaintiff that Defendants were legally 'entitled' to possession and use of Dr. Smith's original 7-16-98 study models." But again, these allegedly false representations were made in December 2003, more than three years prior to the filing of the instant lawsuit.

As discussed above, adding the allegation that appellant learned in October 2007 that the models had been destroyed does not save her fraud claims from the time bar because by then she had already filed the instant lawsuit based on respondents' alleged fraud. Moreover, appellant does not claim that the representation that the models were destroyed is false, nor does she explain how she was deceived by such representation and what action she took, or did not take, in reliance on it. Thus, as a matter of law, this representation is not actionable fraud. Because appellant does not otherwise state how she can amend her complaint, the trial court did not err in sustaining the demurrer without leave to amend as to appellant's fraud claims.

D. Negligence

The FAC alleges negligence against CDA and LADS. "The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff's injury. [Citation.]" (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.) A claim for general negligence is subject to a two-year statute of limitations. (Code Civ. Proc., § 335.1.)

The FAC alleges that respondents CDA and LADS owed appellant a duty to care for and maintain her dental study models and that they breached that duty "by releasing said study models without obtaining any authorization by Plaintiff." But the FAC establishes that appellant knew, or should have known, that CDA and LADS released the models to the other respondents by December 18, 2003, the day Dr. Bettinger produced them at the underlying malpractice trial. Because appellant did not file the instant action until more than three years later, her negligence claim is time-barred. Appellant's proposed SAC omits a negligence claim and she does not otherwise state how she can amend her complaint to assert a timely negligence claim. Accordingly, the trial court did not err in sustaining the demurrer without leave to amend as to appellant's cause of action for negligence.

E. Conspiracy

Finally, the FAC alleges conspiracy against all respondents. The elements of a civil conspiracy are "'(1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting. [Citations.]'" (*Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1048.) The parties agree that because conspiracy is not an independent tort, it is subject to the statute of limitations for the underlying cause of action.

The FAC alleges that on or about June 30, 1999, CDA, LADS, Dr. Bettinger, Hillings and TDIC conspired to convert Dr. Smith's original study models for their use in defending the underlying action and that Harmatz and Hillings furthered the conspiracy through their actions at trial. The FAC also refers generally to a "conspiracy to defraud and deceive Plaintiff" by all respondents. The FAC alleges that "the last overt act" in pursuance of the conspiracy occurred on or about January 22, 2004, when the peer review coordinator for CDA and LADS falsely represented to appellant Dr. Smith's original study models were returned to him on June 30, 1999. These allegations appear in condensed form in the proposed SAC.

The "'last overt act' doctrine" provides that "when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of a plaintiff's claims until the 'last overt act' pursuant to the conspiracy has been completed." (*Wyatt v. Union Mortgage* Co. (1979) 24 Cal.3d 773, 786; *Aaroe v. First American Title Ins. Co.* (1990) 222 Cal.App.3d 124, 128 ["The last overt act doctrine prevents the statute of limitations from beginning to run in certain cases, '*even after the fraud is discovered* . . . ,' until the commission of the last overt act pursuant to the conspiracy"].) As the *Wyatt* court explained: "Just as the statute of limitations does not run against an action based on fraud so long as the fraud remains concealed, so ought the statute to be tolled *even after the fraud is discovered, for so long as the sheer economic duress or undue influence embedded in the fraud continues to hold the victim in place*." (*Wyatt v. Union Mortgage* Co., *supra*, at p. 788.)

Relying together on this doctrine, the above-cited allegation and the further proposed allegation that she did not learn until October 2007 that the models had been destroyed, appellant argues that her conspiracy claim is not time-barred. As to a claim for conspiracy to defraud, we disagree. We have already concluded that the representations made in January 2004 and October 2007, the only two representations that would extend the statute of limitations so as to make appellant's instant action timely, are not actionable as a matter of law. "A conspiracy is not actionable unless a *wrongful act* was committed with resulting *damage*." (5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 46, p. 114.)

We also find that, as a matter of law, here there can be no liability for conspiracy to convert the original study models. At the hearing on the demurrer, appellant's attorney agreed with the trial court that there was no liability for conversion and trespass to chattel by those respondents who were opposing counsel, parties and witnesses in the underlying malpractice case because they "don't have a duty to my client." But appellant's attorney argued that CDA, and presumably LADS, nevertheless owed such a duty. The problem for appellant here, though, is that without direct liability by other tortfeasors for conversion and trespass to chattel, there can be no liability for conspiracy to convert or to

commit trespass to chattel by CDA and LADS. "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, *although not actually committing a tort themselves,* share with the immediate tortfeasors a common plan or design in its perpetration. (*Wyatt v. Union Mortgage Co.*, *supra*, 24 Cal.3d at p. 784.) By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own *the torts of other coconspirators* within the ambit of the conspiracy." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510–511, italics added.) Liability based on a conspiracy theory is "'derivative,' i.e., liability is imposed on one person for the direct acts of another." (*Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 579.) Thus, in the absence of any direct liability by the other respondents for the underlying torts of conversion and trespass to chattel, there can be no derivative liability for conspiracy by CDA and LADS.

Appellant's proposed SAC does not dictate a different outcome and appellant does not otherwise state how she can amend her complaint to assert a timely and viable conspiracy claim. Accordingly, the trial court did not err in sustaining the demurrer without leave to amend as to appellant's claim for conspiracy.

DISPOSITION

The judgment of dismissal is affirmed. Respondents are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ